## COPINGER-SYMES v. COPINGER-SYMES & ANOR.

[Divorce Jurisdiction (Good J.) January 28, 1959]

[Ipoh — Divorce Suit No. 3 of 1958]

*Divorce — Petition for decree of dissolution of marriage on ground of adultery — Proof of marriage solemnised in Irish church—Admission of adultery — Proof of adultery — Domicile of parties — British army officer of Irish origin — Intention not to live in Ireland — No sufficient proof of acquisition of domicile of choice — Divorce Ordinance, 1950.*

*Evidence Ordinance, 1950, s.82 — Certified true extract from Marriage Register of Church marriage — Whether admissible.*

The petitioner is a regular British Army officer on secondment to the Federation Army. He married the respondent in Ireland in 1950. The issues to be decided were (1) whether the marriage and the adultery had been proved so as to entitle the petitioner to a decree of dissolution, or judicial separation, and (2) the domicile of the parties to the marriage. Petitioner sought to prove his marriage by his own sworn evidence and by production of a certified true extract from the Marriage Register of the Church in which the marriage was solemnised signed by the clergyman; and as to adultery, he sought to prove it by written admissions voluntarily made by the respondent and the co-respondent and by inferences to be drawn from circumstances to which he had testified.

The petitioner was born in Ireland; his father, now deceased, was born and permanently resident in Southern Ireland, and his mother still lives there. The petitioner's case was that when he joined the British Army in England in 1944 and became a full-time regular soldier, he abandoned his domicile of origin and acquired a domicile of choice in the United Kingdom. In 1953 he voluntarily became registered as a citizen of the United Kingdom and Colonies under section 6(1) of the British Nationality Act, 1948, and this circumstance was urged as corroborative evidence of his intention permanently to sever his connection with Ireland, and to acquire an English domicile.

**Held:** (1) a certified true extract from the Marriage Register of the Church in which the marriage was solemnised signed by the officiating clergyman is admissible in England, and therefore by virtue of section 82 of the Evidence Ordinance is admissible also in the Courts in Malaya;

(2) confessions or admissions of adultery by a respondent are jealously scrutinised, especially if made by a spouse who desires to be divorced, and the Court will refuse to act upon confessions alone unless the surrounding circumstances indicate that the confession is true. In the circumstances of this case, the petitioner has proved his case;

(3) the petitioner's sworn testimony that he has formed the intention not to live in Ireland is a purely negative intention and it is not sufficient to support the acquisition of a domicile of choice since it only discloses the existence of the animus without establishing the necessary factum;

(4) he has not succeeded in bringing himself within the jurisdiction of the Court so far as his petition for a decree of dissolution of marriage is concerned.

Decree of judicial separation ordered.

*Cases referred to:—*

(1) *Wallace* v. *Wallace* (1896) 74 L.T. 253.

(2) *Whitton* v. *Whitton* [1900] P. 178.

(3) *Boldrini* v. *Boldrini & Martini* [1932] P. 9, 13, 17.

(4) *Donaldson* v. *Donaldson* [1949] P. 363, 365.

(5) *Wilson* v. *Wilson* (1872) 2 P. & D. 435, 447.

(6) *Hickson* v. *Hickson* [1935] M.L.J. 265; [1935] F.M.S.L.R. 140, 150.

(7) *Ex parte Cunningham, In re Mitchell* (1884) 13 Q.B.D. 418, 422, 423, 425.

(8) *Forbes* v. *Forbes* 69 E.R. 145, 151.

(9) *Somerville* v. *Somerville* 31 E.R. 839, 840.

(10) *In re Macreight, Paxton* v. *Macreight* (1885) 13 Ch.D. 165, 168.

DIVORCE.

*W. J. Huntsman* for the petitioner.

*Yeoh Kian Teik* for the co-respondent.

*Cur. Adv. Vult.*

**Good J.:** This is a petition for a decree of dissolution of marriage on the ground of adultery. The petitioner is a regular officer in the British Army which he joined in 1944. He holds the rank of Major in the Royal Inniskilling Fusiliers, and is at present on a three-year secondment to the Federation Army.

The petitioner married the respondent in the Republic of Ireland in 1950, and there is one child of the marriage. There is no application for custody in the present proceedings (and I was informed that the child is out of the jurisdiction). The petitioner has abandoned his claim for costs against the co-respondent, and only two issues remain to be decided: (1) whether the marriage and the adultery have been proved so as to entitle the petitioner to a decree of dissolution, or of judicial separation, as the case may be; and (2) the domicile of the parties to the marriage. The jurisdiction of this Court to make a decree of dissolution being limited to cases where at the time when the petition was presented both parties were domiciled either in the Federation or in the United Kingdom, and there being some doubt as to the petitioner's domicile, the petitioner has included in his petition an alternative prayer for a decree of judicial separation.

The marriage between the petitioner and the respondent is proved by the petitioner's own sworn evidence and by the production of a certified true extract from the Marriage Register of the Church in which the marriage was solemnised signed by the officiating clergyman. The question arises whether this document is admissible in a Federation Court under the law of the Federation. Section 82 of the Evidence Ordinance, 1950, provides:—

> "When any document is produced before any Court, purporting to be a document which by the law in force for the time being in England or Northern Ireland would be admissible in proof of any particular in any Court of Justice in England or Northern Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed —

(a) the Court shall presume that such seal, stamp or signature is genuine, and that the person signing it held at the time when he signed it the judicial or official character which he claims;

(b) the document shall be admissible for the same purpose for which it would be admissible in England or Northern Ireland."

It therefore becomes necessary to determine whether Exhibit P.2 would be admissible in proof of the marriage in a Court of Justice in England without proof of the officiating clergyman's signature, and without proof that when he signed the certificate he was the incumbent of the office of Rector of the parish. This question arose in *Wallace* v. *Wallace* [1] and in *Whitton* v. *Whitton* [2]. In both those cases, the proof of the marriage was tendered in precisely the same form as it has been tendered in the present case. In *Wallace* v. *Wallace* a copy of an entry, taken from the Register of Marriages solemnised at St. Kevin's Church, Dublin, in the year 1866, was put in. The copy purported to be signed and certified as a true copy by the clergyman of the parish. In *Whitton* v. *Whitton* a copy of an entry in the Register of Marriages, certified by the Curate of the Mariners' Church, Kingstown, in the County of Dublin, was put in. In *Wallace* v. *Wallace*, Barnes, J. said: "Is that sufficient in the case of an Irish marriage? I rather think that the Registrar-General's certificate is requisite in such cases." In *Whitton* v. *Whitton*, Jeune, P. said: "Is that sufficient to prove a valid marriage? Must there not also be evidence that the marriage in question was a good and valid marriage according to the law of Ireland? The point is technical, and may seem rather absurd from a popular point of view; but, in matters of such importance as marriage and divorce, we must be strictly regular." In both cases Counsel for the petitioner relied on sections 10 and 14 of Lord Brougham's Act (14 & 15 Vict. c.99), and the learned Judge and President respectively were satisfied and admitted the certified copy of the entry without further proof. That the position has in no way been altered by constitutional changes which have taken place in Ireland since those cases were decided appears clear from section 2(1) of the Ireland Act, 1949, by which it is expressly declared that the Republic of Ireland is not a foreign country for the purposes of any law in force in the United Kingdom. From this it would appear to follow that the application of the relevant provisions of Lord Brougham's Act is saved from extinction notwithstanding the metamorphosis which has overtaken the constitutional relationship between the two countries, and I see no reason to suppose that the Courts in England since the 18th of April, 1949, when the twenty-six counties then known as Eire became a Republic, would not follow *Wallace* v. *Wallace* and *Whitton* v. *Whitton*, and continue to admit such certified entries in proof of marriages solemnised in the territory comprised in the Republic of Ireland. It follows that if such a certified entry is admissible in England, as I think it is, it will by virtue of section 82 of our Evidence Ordinance be admissible also in the Courts of this country, and I accordingly admit it and find that the fact of the marriage has been proved.

The adultery is proved by written admissions voluntarily made by the respondent and the co-respondent, and inferences which, it seems to me, must necessarily be drawn from the circumstances to which the petitioner has testified. The relationship between the respondent and the co-respondent during the material time referred to in the Petition is demonstrated by the evidence of the petitioner, which I have no hesitation in accepting, to have been of such a character that the inescapable conclusion is that it was adulterous. Confessions or admissions of adultery by a respondent are, as the learned author of Rayden on Divorce says at page 137 of the 7th Edition, jealously scrutinised, especially if made by a spouse who desires to be divorced. The Court will refuse to act upon confessions alone unless the surrounding circumstances indicate that the confession is true. The petitioner's evidence of the circumstances in which he found the respondent and the co-respondent when he followed his wife to the co-respondent's house on the night of the 27th October, 1957, and the fact that from that date until the 2nd of November when she went to stay in a hotel in Kuala Lumpur she went out every night and did not return until the small hours of the morning (the inference being that she spent the time with the co-respondent since it is unlikely in the circumstances that she spent it with anyone else), to my mind combine to provide the corroboration for which the Court as a matter of common prudence, to put it no higher than that, should look before accepting a confession by the guilty party.

I am satisfied that the case for the petitioner has been proved; that the petitioner has not in any manner been accessory to, or connived at, or condoned the adultery; and that the petition has not been presented or prosecuted in collusion with the respondent or the co-respondent. The petitioner is therefore entitled to a decree of dissolution of marriage, or to a decree of judicial separation, whichever the circumstances of his domicile permit.

The petitioner was born in 1925 in County Mayo, Eire, (now the Republic of Ireland). His father, now deceased, was born and permanently resident in Southern Ireland. His mother still lives there. The petitioner's case is that when he joined the British Army in England in 1944 and became a full-time regular soldier in the Service of the British Crown, he abandoned his domicile of origin and acquired a domicile of choice in the United Kingdom. In 1953 he voluntarily became registered as a citizen of the United Kingdom and Colonies under section 6(1) of the British Nationality Act, 1948, and this circumstance is urged as corroborative evidence of his intention permanently to sever

his connection with Ireland, and to acquire an English domicile. During his military service he has been stationed mainly in the United Kingdom, but from time to time he saw service overseas in Egypt and Malaya with his Regiment, or with Army units to which he was temporarily attached. He paid occasional visits to his parents in Ireland about once in every 2½ years, and during the period from July, 1953, when he returned to the United Kingdom from Egypt, until February, 1957, when he was posted to Malaya, he paid one visit to Ireland to see his parents.

Whatever may be the petitioner's intention with regard to the abandonment of his domicile of origin (and he says that he will never return to Ireland permanently but will on retirement settle down either overseas or in England), he has not yet taken any overt step, except to join the British Army, from which there could be inferred an intention to acquire a new domicile of choice. All the authorities are unanimous in holding with Lord Handworth, M.R. in *Boldrini* v. *Boldrini and Martini* [3] that the matter "must be decided *animo et facto*." Lawrence, L.J. in the same case said: "What had to be shown is that when the petitioner presented his petition he was residing in England with the fixed intention of making England his home." And in *Donaldson* v. *Donaldson* [4] Ormerod, J. said: "Counsel for the respondent must satisfy me that at the time of this divorce (i.e. a divorce between the same parties in the United States) .....the respondent was not only residing in Florida but had made up his mind to reside there permanently and had thereby acquired a domicile of choice." The person claiming to have acquired a new domicile of choice must, for his claim to succeed, have "burnt his boats." He must have settled in the country of his choice, or at least have taken some step indicating an intention to take up permanent residence there, such as the purchase of a house for his own occupation, the transfer of his effects (as an ancient Roman would have removed his *Lares* and *Penates*) or the like.

In *Wilson* v. *Wilson* [5] which is referred to in the local case of *Hickson* v. *Hickson* [6] the Judge Ordinary said: "Change of domicile is to be inferred, as it seems to me, from the man's own oath, coupled with the circumstance that there is not sufficient evidence to induce the Court to disbelieve it." Applying that test I have no hesitation in this case in accepting the petitioner's sworn testimony that he has formed the intention *not* to live in Ireland, but this is a purely negative intention and it is not sufficient to support the acquisition of a domicile of choice since it only discloses the existence of the *animus* without establishing the necessary *factum*.

The sole question that remains to be determined is whether the fact that the petitioner joined the British Army operates to effect a change of domicile in his case. His Counsel fairly and frankly admitted the difficulty in which he found himself, but stated that he relied, as authority for the proposition that soldiers in the service of a foreign power are in a special position with regard to the acquisition of a domicile of choice, on the observation of Cotton, L.J. in *Ex Parte Cunningham In re Mitchell* [7] where the learned Lord Justice said: "No doubt, if a foreigner enters the British Army and resides in England his domicile will be in England." This was *obiter dictum* since the precise point did not fall to be decided in that case, but in the context in which it was said and in the light of the judgments of the other members of the Court of Appeal and of passages quoted from earlier cases, I might feel obliged to follow it in the present case if it could be shown that when he joined the British Army the petitioner had the status of an alien under the law of England. Counsel for the petitioner also relied on a number of cases in which the domicile of covenanted servants of the old East India Company had to be determined and which the Court of Appeal in *Mitchell's* case was invited to follow. *Forbes* v. *Forbes* [8] will suffice to demonstrate the principle which these cases established. In that case, Page Wood, V.C. said:

> "I apprehend that the question does not turn upon the simple fact of the party being under an obligation by his commission to serve in India; but when an officer accepts a commission or employment, the duties of which necessarily require residence in India, and there is no stipulated period of service, and he proceeds to India accordingly, the law, from such circumstances, presumes an intention consistent with his duty, and holds his residence to be *animo at facto* in India.....and I think it concluded by authority, in which conclusion my reason entirely acquiesces, that a service in India, under a commission in the Indian Army, of a person having no other residence creates an Indian domicile."

Baggallay, L.J., in *Mitchell's* case, commenting upon the line of cases of which I take *Forbes* v. *Forbes* to be representative, said:

> "There are some anomalous cases in which a subject of the Queen had entered into the service of the old East India Company, and it was held that he had acquired what was called an Anglo-Indian domicile. Such cases can hardly arise now, because the separate government of the East India Company is at an end, and the army in British India is now part of the Queen's army. Perhaps they rather depended on the notion that the officer had entered into the service of a quasi foreign power."

Cotton, L.J. in the same case expounded the *ratio decidendi* in *Forbes* v. *Forbes* in the following words:

> "The ground of the decisions in those cases was that the officer was residing in India under circumstances which shewed that he intended to abandon his domicile of origin, under circumstances which rendered it his duty to reside there permanently. It was not the entering the service, but the residence in India under circumstances which required him to remain there, which caused the change of domicile."

and he goes on to say:

> "A Scotchman entering into the British army does not by that fact alone acquire a different domicile. His residence in England is only a temporary one for the purpose of discharging his military duties."

Following Cotton, L.J., Lindley, L.J. says:

"But, when we are asked to say that, by merely entering into the English Army, an Irishman loses his domicile of origin, I think there is no authority for the proposition."

Lindley, L.J. had earlier in his judgment considered the cases involving the question of Anglo-Indian domicile and his comments seem to be very much in point there. He said:

"It is not suggested that those cases have been overruled, but reliance has been placed on the cases relating to Anglo-Indian domicile. Those cases were anomalous and exceptional, and the theory of them is not very clear. I think it was correctly explained by Turner, L.J. in *Jopp* v. *Wood*.* He said: 'At the time when those cases were decided the government of the East India Company was in a great degree, if not wholly, a separate and independent government, foreign to the government of this country; and it may well have been thought that persons who had contracted obligations with such a government for service abroad could not reasonably be considered to have intended to retain their domicile here. They in fact became as much estranged from this country as if they had become servants of a foreign government.'"

The position becomes clear in the light of the comments of the Court of Appeal in *Mitchell's* case. It is not the fact of being a soldier, but the fact of having entered the service of a foreign or quasi-foreign government in circumstances incompatible with the retention of the domicile of origin, that formed the *ratio decidendi* of the cases on which the petitioner relies. Those cases are, to adopt the description applied to them by Lindley, L.J., "anomalous and exceptional" and if the petitioner is to succeed he must show that his is an anomalous and exceptional case on all fours with the East India Company cases, in which event the principle established by those cases might have to be applied here, since they have never been overruled and they would be applicable if the circumstances of the present case could be shown to be identical. But in order to show this the petitioner would have to satisfy the Court that at the time of joining the British Army he was an alien or quasi-alien since the authorities seem to be unanimous that a British subject having a domicile outside England does not acquire English domicile by joining an English regiment. In support of this proposition, I refer (a) to *Ommaney* v. *Bingham* which is unreported but which is fully discussed in *Somerville* v. *Somerville* [9]; (b) to *In re Macreight. Paxton* v. *Macreight* [10] in which Pearson, J. said:

"A British subject does not by merely entering into the British army abandon his domicile, and his remaining in the army is no evidence of an intention to abandon the domicile which he had at the time when he entered it."

and (c) to the observations of Cotton and Lindley, L.J., in *In re Mitchell*, as to the position of Scotsmen and Irishmen who join the British Army, which I have already quoted.

It now becomes necessary to ascertain whether the force of the decisions in the three cases last cited has been in any way impaired, or their applicability limited, by the constitutional changes which have taken place in Ireland, and in this connection it is necessary to determine the national status of the petitioner at the time when he joined the British Army. In Halsbury, 3rd Edition, Volume I, page 357, paragraph 1033, under the heading 'Citizens of the Republic of Ireland', the position before 1949 is summarised as follows:

"Under the law in force before 1st January, 1949, (i.e. the British Nationality and Status of Aliens Acts, 1914 to 1943) any person born, or whose father was born, anywhere in Ireland, including the twenty-six counties now forming the Republic of Ireland, was a British subject. Furthermore any person born after 6th December, 1922 (i.e. the date on which the Constitution of the Irish Free State came into operation) in the part of Ireland now forming the Republic of Ireland, was also, under the law of that country, a citizen of Eire."

It follows that in 1944 the petitioner was not in English law a foreigner. He was a British subject domiciled in Eire which was then a part of His Majesty's dominions. It ceased to be so on the 18th April, 1949, by virtue of section 1(1) of the Ireland Act, 1949. The fact that he was also a citizen of Eire did not make him an alien or even a quasi-alien (the non-alien status of citizens of Eire having been recognised by the British Nationality Act, 1948, which made special provision for enabling citizens of Eire who were also British subjects to claim to remain British subjects and for certain categories of persons born on or after 6th December, 1922, who lost their status as British subjects by reason of the passing of the Act, to be reinstated as British subjects by becoming registered as citizens of the United Kingdom and Colonies). The petitioner took advantage of these provisions and became registered as a citizen of the United Kingdom and Colonies. Whatever his status may have been (and for the purposes of this case it is unnecessary to determine it) between the coming into force of the British Nationality Act, 1948, on the 1st day of January, 1949 and the taking of a positive overt step to obtain his registration as a citizen of the United Kingdom and Colonies under that Act which he obtained on the 26th May, 1953, it is at all events clear that he was a British subject when he joined the British Army; that he was a British subject when he presented his Petition; and that he is a British subject now. It is clear, therefore, that the law as propounded by Pearson, J. in *Macreight's* case and by Cotton and Lindley, L.J., in *Mitchell's* case is applicable to the petitioner and that he has not by joining the British Army lost his domicile of origin in the territory now known as the Republic of Ireland since he did not acquire an English domicile *ipso facto* by joining the British Army.

Since I have already come to the conclusion that he has done no other act which would entitle him to claim the acquisition of a new

* 4 D.J. & S. 623.

domicile elsewhere than in the Republic of Ireland, I am consequently obliged to hold that he has not succeeded in bringing himself within the jurisdiction of this Court so far as his Petition for a decree of dissolution of his marriage is concerned. Since my jurisdiction only arises if it is shown that both parties were domiciled in the Federation or the United Kingdom at the time of the presentation of the Petition I cannot make a decree of dissolution of marriage in favour of the petitioner; I can only give him a decree of judicial separation, and I order accordingly.

*Order accordingly.*

Solicitors: *Maxwell, Kenion, Cowdy & Jones; Gibb & Co.*

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## SZE HAI TONG BANK LTD. v. RAMBLER CYCLE CO. LTD.

**[J.C. (Lord Denning, Lord Jenkins and the Rt. Hon. L. M. D. de Silva) June 22, 1959]**

**[Privy Council Appeal No. 20 of 1958]**

*Shipping — Bill of lading — Delivery of goods to consignee against written indemnity — Discharge without production of bill of lading — Carrier not responsible after discharge—Implied limitation — Fundamental breach under cloak of general exemption.*

*Contract — Bill of lading.*

The respondents in this case shipped from England to Singapore on the s.s. *Glengarry* bicycle parts to the value of about £3,000 under a bill of lading requiring the goods to be delivered "unto order of his or their assigns," and which by clause 2, provided that "(c)..... the responsibility of the carrier...shall be deemed...to cease absolutely after they are discharged" from the ship. After the goods had been discharged in Singapore the carrier's authorised agent, in accordance with what was alleged to be the common practice in Singapore, released them to the consignee against a written indemnity by the latter's bank, the appellants, in favour of the carrier, but without production of the bill of lading. The consignee never paid for the goods, and on a claim by the respondents against the carrier for damages for breach of contract or for conversion the latter brought in the consignee and the appellant bank as third parties, claiming to be entitled to be indemnified by them. The appellants admitted liability to indemnify the carrier if the latter were held liable. The trial Court gave judgment for the cycle company and also made a declaration that the carrier was entitled to be indemnified by the third parties, and this decision was affirmed by the Court of Appeal, to whom only the bank had appealed. On further appeal to the Privy Council,

**Held:** (1) a shipowner who delivered without production of the bill of lading did so at his peril. In delivering the goods, without production of the bill of lading, to a person who, to its knowledge, was other than one entitled under the bill of lading to receive them, the carrier was liable for breach of contract and conversion, and was not protected by the exemption clause 2(c). The extreme width of that clause must be cut down by an implied limitation; it must be limited and modified to the extent necessary to enable effect to be given to the main object and intent of the contract and at least so as not to permit the carrier deliberately to disregard its obligation as to delivery — to deliver against production of the bill of lading;

(2) a fundamental breach of obligations of a contract cannot be allowed to pass unnoticed under the cloak of a general exception clause.

Appeal dismissed.

*Cases referred to:—*

(1) *Glynn* v. *Margetson & Co.* [1893] A.C. 351.

(2) *G. H. Renton & Co.* v. *Palmyra Trading Corpn. of Panama* [1956] 1 Q.B. 462 at p. 501, [1957] A.C. 149, at p. 164.

(2a) *The Cap Palos* [1921] P. 458, 471.

(3) *Chartered Bank of India, Australia & China* v. *British India Steam Navigation Co. Ltd.* [1909] A.C. 369.

(4) *United Africa Co.* v. *Saka Owoade* [1955] A.C. 130.

(5) *Bontex Knitting Works Ltd.* v. *St. John's Garage* (1944) 60 T.L.R. 44, 253.

(6) *Alexander* v. *Railway Executive* [1951] 2 K.B. 882.

(7) *Karsales (Harrow) Ltd.* v. *Wallis* [1956] 1 W.L.R. 936.

(8) *Smackman* v. *General Steam Navigation Co.* (1908) 13 Com. Cas. 196.

(9) *Ashby* v. *Tolhurst* [1937] 2 K.B. 242.

(10) *Swan Hunter & Wighan Richardson Ltd.* v. *France Fenwick Tyne & Wear Co. Ltd.* [1953] 1 W.L.R. 1026.

PRIVY COUNCIL APPEAL. Appeal from a judgment of the Court of Appeal of the Colony of Singapore.

*T. G. Roche*, Q.C., and *G. R. F. Morris*, Q.C. for the appellants.

*Sir David Cairns*, Q.C., and *Michael Kerr* for the respondents.

*Cur. Adv. Vult.*

The judgment of their Lordships was delivered by

**Lord Denning:** The Rambler Cycle Company Limited manufacture bicycles in England and export them to various parts of the world, and in particular to Singapore, where they have customers called the Southern Trading Company. In 1954 these customers ordered bicycle parts to the value of nearly £3,000 from the Rambler Cycle Company. Payment was to be 90 days, documents against payment. The Rambler Cycle Company made the goods and sent them off to Singapore. They shipped the goods on the steamship "Glengarry," which belongs to Glen Line Limited, and they paid the freight in advance. The steamship company issued a bill of lading dated 30th July, 1954, in which they acknowledged that the goods were shipped by the Rambler Cycle Company and were to be conveyed by the ship "Glengarry" and were to be delivered at the port of Singapore "unto Order or his or their assigns." There was noted on the bill of lading a request by the Rambler Cycle Company saying: "Notify: Southern Trading Company, C Short Street, Singapore." The Rambler Cycle Company